

1-1158

No. \_\_\_\_\_

Supreme Court, U.S.  
FILED  
JAN 16 1992  
OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,  
*Petitioners,*

v.

THE STATE OF LOUISIANA, ET AL.,  
*Respondents.*

**Petition For Writ Of Certiorari To The United States  
Court Of Appeals For The Fifth Circuit**

**PETITION FOR WRIT OF CERTIORARI**

CHARLES ALAN WRIGHT  
727 East 26th Street  
Austin, Texas 78705

MIKE MOORE, Attorney General  
ROBERT E. SANDERS, Assistant  
Attorney General  
State of Mississippi  
P. O. Box 220  
Jackson, Mississippi 39205

ROBERT R. BAILLESS  
WHEELLESS, BEANLAND, SHAPPLEY &  
BAILLESS  
P. O. Box 991  
Vicksburg, Mississippi 39181

JAMES W. MCCARTNEY  
*Counsel of Record*  
VINSON & ELKINS L.L.P.  
3201 First City Tower  
1001 Fannin Street  
Houston, Texas 77002-6760  
(713) 758-2324  
FAX (713) 758-2346

*Counsel for Petitioners*

January 16, 1992

**QUESTIONS PRESENTED**

1. Whether the court below erred in determining the boundary between the States of Mississippi and Louisiana.
2. Whether the court below exceeded its authority under Rule 52(a) in disregarding findings of fact by the trial court as "clearly erroneous."
3. Whether the court below had jurisdiction to determine this controversy.

## PARTIES TO THE PROCEEDING BELOW

### The State of Mississippi

Julia Donelson Houston (now Ehrhardt), Ruth Houston Baker and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, Deceased

### Ruth Houston Baker, Individually

### The State of Louisiana

### The Lake Providence Port Commission

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDING BELOW .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	2
JURISDICTION .....	2
STATUTE INVOLVED .....	2
STATEMENT OF THE CASE .....	2
REASONS FOR GRANTING THE WRIT .....	6
I. The Court Below Misapplied the Rule of the Thalweg and the Doctrine of Acquiescence ....	7
A. The Fifth Circuit's Error in Applying the Thalweg Rule .....	8
B. Misapplication of the Doctrine of Acquiescence .....	10
II. The Court Below Exceeded the Proper Scope of Review Under Rule 52(a) .....	12
III. There Is a Serious Question, Which Only This Court Can Resolve, About the Binding Effect of the Judgment Below .....	16
CONCLUSION .....	20
APPENDIX .....	1a, et seq.

## TABLE OF AUTHORITIES

## Page

## CASES

<i>Anderson v. City of Bessemer City</i> , 470 U.S. 564 (1985) .....	14, 15, 16
<i>Arkansas v. Tennessee</i> , 246 U.S. 158 (1918) .....	8
<i>Arkansas v. Tennessee</i> , 310 U.S. 563 (1940) .....	8, 10, 11
<i>Durfee v. Duke</i> , 375 U.S. 106 (1963) .....	17, 18
<i>Georgia v. South Carolina</i> , ___ U.S. ___, 110 S.Ct. 2903 (1990) .....	17, 18
<i>Horton v. U.S. Steel</i> , 286 F.2d 710 (5th Cir. 1961) .....	13
<i>Houston v. Thomas</i> , 937 F.2d 247 (5th Cir. 1991) .....	2, 6, 10, 13, 14, 15
<i>Houston v. U.S. Gypsum Co.</i> , 569 F.2d 880 (5th Cir. 1978), rehearing denied, 580 F.2d 815 (5th Cir. 1978), on remand, 652 F.2d 457 (5th Cir. 1981) .....	9, 11, 12
<i>Indiana v. Kentucky</i> , 136 U.S. 479 (1890) .....	10, 11, 12
<i>Iowa v. Illinois</i> , 147 U.S. 1 (1893) .....	8
<i>Louisiana v. Mississippi</i> , 202 U.S. 1 (1906) .....	10, 11, 12
<i>Louisiana v. Mississippi</i> , 466 U.S. 96 (1940) .....	8
<i>Louisiana v. Mississippi</i> , 488 U.S. 808 (1988) .....	4
<i>Louisiana v. Mississippi</i> , 488 U.S. 990 (1988), 489 U.S. 1050 (1989) .....	4, 5, 17
<i>Missouri v. Kentucky</i> , 78 U.S. (11 Wall.) 395 (1871) .....	7, 8
<i>Nebraska v. Iowa</i> , 143 U.S. 359 (1892) .....	8
<i>Uhlhorn v. U.S. Gypsum Co.</i> , 366 F.2d 211 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967) .....	8

## TABLE OF AUTHORITIES - Continued

## Page

<i>Underwriters National Assurance Co. v. North Carolina Life &amp; Acc. &amp; Health Ins. Guar. Assn.</i> , 455 U.S. 691 (1982) .....	19
<i>Vermont v. New Hampshire</i> , 289 U.S. 593 (1933) .....	11
<i>Virginia v. Tennessee</i> , 148 U.S. 503 (1893) .....	11
STATUTES	
28 U.S.C. § 1251(a) (1988) .....	2, 3, 19
28 U.S.C. § 1254(1) (1988) .....	2
RULES	
Fed. R. Civ. P. 52(a) .....	12, 13, 14

No. \_\_\_\_\_

— ♦ —  
In The  
**Supreme Court of the United States**  
October Term, 1991  
— ♦ —

THE STATE OF MISSISSIPPI, ET AL.,  
*Petitioners,*

v.

THE STATE OF LOUISIANA, ET AL.,  
*Respondents.*

— ♦ —  
**Petition For Writ Of Certiorari To The United States  
Court Of Appeals For The Fifth Circuit**  
— ♦ —

**PETITION FOR WRIT OF CERTIORARI**  
— ♦ —

The State of Mississippi ("Mississippi"), Julia Donelson Houston, Ruth Houston Baker and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, Deceased, and Ruth Houston Baker, Individually ("the Houston group"), seek review of the Decision of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit" or "court below") reversing and rendering the Judgment of the United States District Court for the Southern District of Mississippi ("Mississippi District Court") that determined the boundary of the States of Mississippi and Louisiana to lie west of an island in the Mississippi River known as Stack Island or Island No. 94 ("Stack Island").



Respondents are the State of Louisiana ("Louisiana") and the Lake Providence Port Commission ("Port Commission").

---

### OPINIONS BELOW

The opinion of the court below is reported as *Houston, et al. v. Thomas, et al.*, 937 F.2d 247 (5th Cir. 1991), and is reproduced in the Appendix to this Petition. App. at 1a.

---

### JURISDICTION

The Judgment of the court below was entered on August 5, 1991. App. at 1a. Rehearing was denied on October 22, 1991. App. at 16a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988). App. at 18a.

---

### STATUTE INVOLVED

The principal statutory provision involved is 28 U.S.C. § 1251(a) (1988). It states: "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."

---

### STATEMENT OF THE CASE

This case involves the boundary between the States of Mississippi and Louisiana in the vicinity of an island located in the Mississippi River, together with the rights

of individual owners claiming title under patent from the United States and a deed from the State of Mississippi.

The island involved, known as "Stack Island" or "Island No. 94," has been known to exist, or appears from evidence in this cause to have existed, since the 1826-1827 era. The individual claimants, the Houston group, claim under a patent from the United States issued to Stephen B. Blackwell in 1888, effective 1881, as well as a deed from the State of Mississippi issued in 1933 following a tax foreclosure.

This case was originally brought by the Houston group in the Mississippi District Court to quiet title. The State of Louisiana and the Lake Providence Port Commission intervened, seeking a determination that Stack Island was located within the boundary of Louisiana.<sup>1</sup> Thereafter, Louisiana sought to have this Court assume original jurisdiction under Article III, Section 2, of the United States Constitution and 28 U.S.C. § 1251(a) (1988). *Louisiana v. Mississippi*, No. 114, October Term 1988. It maintained that "the states are the real parties at interest" (La. Brief in Support of Pet. for Reh. at 8; App. at 95a) and that this Court was "the only forum to settle this dispute, fix the boundary line between the States and determine finally the rights of the parties." (La. Br. in Support of Motion at 16; App. at 84a) Louisiana further asserted that, as a boundary dispute, the issue was "subject to the exclusive jurisdiction of [this Court]" (La. Motion for

---

<sup>1</sup> No question with respect to the Mississippi District Court having jurisdiction was raised by Louisiana in its Petition to Intervene in that court.

Leave to File Complaint at 1; App. at 80a) and that "[this Court] alone has the power to fix and determine the boundary lines herein described." (La. Pet. for Reh. at 2; App. at 95a)

Mississippi, together with the Houston group, urged this Court not to take jurisdiction on the grounds that an alternative forum, the Mississippi District Court, could determine the issues and that the normal review procedure, including certiorari, would be available to any party dissatisfied with the result.<sup>2</sup> (Miss. Br. in Opp. at 6, 7; App. at 86a, 87a)

By order issued October 3, 1988, this Court denied the application for stay of the proceedings in the Mississippi District Court. *Louisiana v. Mississippi*, 488 U.S. 808 (1988); App. at 89a. Thereafter by order dated December 12, 1988, the motion of Louisiana for leave to file a bill of complaint was denied. 488 U.S. 990, 991 (1988); App. at 91a. The dissent filed by Justice White noted that this Court had "exclusive jurisdiction over controversies between States" and that "[n]o other court may entertain Louisiana's complaint against Mississippi." *Id.* at 991; App. at 91a. It further noted that, while the "suit might settle the dispute among the [private] parties and the State," a judgment that the island is in Louisiana "would not bind Mississippi," emphasizing again that a boundary dispute between two States is "exclusively our business." *Id.*

<sup>2</sup> It was also argued that the expenses involved militated in favor of permitting a decision by the District Court of Mississippi. App. at 86a.

No opinion was filed by the majority.<sup>3</sup> Louisiana's motion for rehearing and alternative motion to file a separate complaint were denied by order issued February 27, 1989. *Louisiana v. Mississippi*, 489 U.S. 1050 (1989); App. at 93a.

The matter proceeded to trial before the Mississippi District Court. Findings of fact were made by the trial judge with respect to the location of the boundary between Mississippi and Louisiana and the conclusion was reached pursuant to such findings that Stack Island was located within Mississippi. *See* App. at 63a, 76a. The trial judge also reviewed the facts regarding Mississippi's exercise of dominion and jurisdiction over Stack Island for a long period of time and found that Louisiana was barred by the Doctrine of Acquiescence.<sup>4</sup> App. at 37a-41a. Finally, title was quieted in the Houston group. App. at 74a, 75a.

Louisiana and the Port Commission appealed. The Fifth Circuit reversed. Describing the case as a "boundary dispute as treacherous as Old Man River itself," the Fifth

<sup>3</sup> The decision was by a vote of five-to-three, Justice Brennan not participating.

<sup>4</sup> Stack Island was patented by the United States to Stephen B. Blackwell as land within Issaquena County, Mississippi in 1888, effective 1881, and pursuant to an 1881 survey. The trial judge's findings largely addressed expert interpretation of documentary evidence with respect to circumstances existing in 1881, as well as factual matters relating to acquiescence. *See* App. at 24a, *et seq.*, 29a, 32a, 36a. Other evidence in the record regarding the location of Stack Island prior to 1881 was not specifically addressed.

Circuit stated that the findings of fact made by the trial judge were "clearly erroneous," entered findings of its own, and concluded that Stack Island lay within the jurisdictional limits of the State of Louisiana. 937 F.2d at 252; App. at 1a.<sup>5</sup>

A Petition for Rehearing and a Suggestion for Rehearing En Banc were denied. App. at 16a.

---

### REASONS FOR GRANTING THE WRIT

The Fifth Circuit erred as a matter of law in looking only to evidence from 1881 forward, rather than from 1812 when Louisiana became a state, in determining the location of the thalweg of the Mississippi River and the first known existence of Stack Island. It substituted its own evaluation of the evidence for that of the Mississippi District Court, contrary to this Court's pronouncement about the proper scope of review in a case tried without a jury. If this were only a dispute between private claimants to land, these errors might not merit review here, but when they resulted in an erroneous determination of the boundary between the States of Louisiana and Mississippi, they require the attention of this Court. This is underlined by the uncertainty about the binding effect of the judgment below, uncertainty that only this Court can resolve.

---

<sup>5</sup> The court below noted that Louisiana had sought to have this Court exercise its original jurisdiction in what it described as "this dispute between states" but observed, "Inexplicably, the High Court declined the invitation." *Houston v. Thomas*, 937 F.2d at 249; App. at 3a.

### I. THE COURT BELOW MISAPPLIED THE RULE OF THE THALWEG AND THE DOCTRINE OF ACQUIESCENCE

In determining Stack Island to be in Louisiana, the Fifth Circuit committed fundamental error in the application of the Thalweg Rule. It addressed only evidence from 1881 forward. Under the Rule of the Thalweg, such evidence was irrelevant.

If Stack Island was east of the boundary channel of the Mississippi River at any time, beginning with the date that Louisiana became a state (1812), or if Stack Island was formed thereafter east of the boundary channel, Stack Island is a part of Mississippi. This is the rule laid down in *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395 (1871).

When fixed by navigable waters, such as the Mississippi River, the Rule of the Thalweg locates the boundary between states along the thalweg, or center, of the main navigation channel of the dividing waterway. The boundary shifts gradually with gradual changes in the location of the channel but does not shift with avulsive, sudden or violent changes. The Island Rule, applicable here, represents an exception to the Rule of the Thalweg in that, once an island is within the confines of the state's boundaries, it remains a part of the state's territory even though the thalweg may shift gradually from one side of the island to the other. In this case, as an example, even though the thalweg might shift from the west side of Stack Island to the east side on a gradual basis, the island would remain within the territorial limits of Mississippi. These rules are well established by the decisions of this



Court.<sup>6</sup> See, e.g., *Iowa v. Illinois*, 147 U.S. 1 (1893); *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *Arkansas v. Tennessee*, 310 U.S. 563 (1940); *Louisiana v. Mississippi*, 466 U.S. 96 (1984); *Nebraska v. Iowa*, 143 U.S. 359 (1892); *Missouri v. Kentucky*, *supra*.

#### A. The Fifth Circuit's Error in Applying The Thalweg Rule

The Fifth Circuit addressed only evidence with respect to the location of the thalweg from and after 1881.<sup>7</sup> If Stack Island existed at the time of the admission of Louisiana or Mississippi to the Union or prior to 1881, which is clear from the evidence, is undisputed, and is assumed for purposes of the Fifth Circuit's decision, the location of the thalweg in 1881 is irrelevant. Under the Island Rule, Stack Island would remain a part of the state within whose jurisdiction it was originally located. In order for the Fifth Circuit to determine whether Stack Island was within the territorial limits of Mississippi or Louisiana, it was necessary for it to determine where the island was located at the earliest date of its known existence.

<sup>6</sup> See general discussion and citations in *Uihorn v. U.S. Gypsum Co.*, 366 F.2d 211 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967). The Fifth Circuit recognizes the Island Rule exception. See 937 F.2d at 258; App. at 6a.

<sup>7</sup> It failed to consider the substantial body of evidence in the record with respect to the existence and location of Stack Island prior to 1881.

The record evidence shows Stack Island as having been in existence in the 1826-1827 era.<sup>8</sup> Such evidence showed the island as lying east of the boundary channel, separated from the Mississippi mainland by a narrow chute. Further, maps generated circa 1867 showed the island within the jurisdiction of Mississippi. A map entitled "Reconnaissance of the Mississippi River in 1874" made pursuant to an 1874 act of Congress reflected Stack Island in Mississippi. An 1879 map made as a part of a blueprint plan for the Mississippi River Commission likewise showed the island in Mississippi with only a narrow chute separating it from the Mississippi mainland. This documentary evidence is not mentioned or considered by the Fifth Circuit nor was evidence of an 1828-1829 United States survey of what is now East Carroll Parish, Louisiana, showing no island in the Mississippi River on the Louisiana side of the boundary channel.

To reverse and render, the Fifth Circuit was required to review the entire record, including evidence of the location of and existence of Stack Island prior to 1881. It

<sup>8</sup> In earlier litigation between the Houston Group and an adverse claimant, the Fifth Circuit noted in its opinion: "We begin with 'Stack Island' in the Mississippi River, so identified in the original 1826 United States Land Survey (platted as 'Island No. 94' by the government in 1881)." *Houston v. United States Gypsum Co.*, 569 F.2d 880, 881 (5th Cir. 1978). Indeed, in that case the court observed, "An avulsion does not change the boundary. Hence, all the territory involved in this controversy is in Issaquena County, Mississippi, even though Stack Island is now west of the main channel of the Mississippi River." *Id.* at 881, n. 2.

did not do so.<sup>9</sup> The court below simply misunderstood the Rule of the Thalweg and in effect transferred Mississippi land to Louisiana, a transfer this Court should correct.

### B. Misapplication of the Doctrine of Acquiescence

The Doctrine of Acquiescence is an equally well-established rule fixing state boundaries as a result of acts of state dominion, control, and sovereignty over land coupled with a failure by the adjoining state to assert claims of right or jurisdiction. *Arkansas v. Tennessee*, 310 U.S. 563 (1940); *Louisiana v. Mississippi*, 202 U.S. 1 (1906); *Indiana v. Kentucky*, 136 U.S. 479 (1890).

The trial court, having found facts and concluded that the Thalweg and Island Rules located Stack Island in Mississippi, made additional findings with respect to acquiescence to secure its ultimate conclusion. See App. at 37a. The Fifth Circuit, selectively discussing portions of the evidence, concluded that the facts found by the trial court did not establish acquiescence. See 937 F.2d at 253-54; App. at 12a-14a. Its application of the facts to the law, however, was in error and created an erroneous result that this Court should correct. The record

<sup>9</sup> No evidence was offered by Louisiana dated prior in time to 1882. Under these circumstances, the Fifth Circuit was required to accept as uncontroverted all evidence in the record with respect to the location of Stack Island dated prior to 1881. This evidence demonstrated that the island was at all times from the earliest indications of its existence located within the jurisdiction of the State of Mississippi.

overwhelmingly supports the trial court's finding of acquiescence, both as a matter of fact and law.<sup>10</sup>

While acquiescence is a matter to be determined by the fact finder, acts indicating acquiescence include:

1. Patents issued by the United States showing property to be in a particular state. *Louisiana v. Mississippi*, 202 U.S. 1, 55-56 (1906). Stack Island was patented as land in Mississippi. App. at 37a.
2. The assessment and payment of taxes. *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Arkansas v. Tennessee*, 310 U.S. at 567-68; *Louisiana v. Mississippi*, 202 U.S. at 55; *Virginia v. Tennessee*, 148 U.S. 503, 510 (1893). The trial court found taxes to have been assessed by Issaquena County, Mississippi, since 1889. App. at 37a-40a.
3. Acts and recognitions of individuals that tend to show in which state the land is located. *Louisiana v. Mississippi*, 202 U.S. at 56; *Arkansas v. Tennessee*, 310 U.S. at 565-66; The trial court identified these at length. App. at 37a, 38a.
4. Court actions concerning the land. *Indiana v. Kentucky*, 136 U.S. at 518-19. Both Mississippi state and federal courts have exercised jurisdiction over controversies involving Stack Island. App. at 21a, 52a. See, e.g., *Houston v. U.S. Gypsum Co.*, 569 F.2d 880 (5th Cir. 1978), rehearing denied, 580 F.2d 815 (5th Cir. 1978), on remand, 652 F.2d 467

<sup>10</sup> The determination of acquiescence is a "question of fact." *Arkansas v. Tennessee*, 310 U.S. at 567. The Master in that case recited evidence of dominion and jurisdiction similar to that found by the trial court here. This Court concluded the finding of acquiescence to be "fully supported by the record." *Id.* at 569. The same is true here.

(5th Cir. 1981). The decisions of the Fifth Circuit also discuss facts relating to the use and payment of taxes on Stack Island to Mississippi authorities for the last half century. See 652 F.2d at 472; App. at 21a, 38a.

5. Township surveys prepared by the United States General Land Office. *Indiana v. Kentucky*, 136 U.S. 479, 512-514 (1890); *Louisiana v. Mississippi*, 202 U.S. 1, 53 (1906). Such surveys indicated Stack Island to be in Mississippi.
6. Grants by the state to individuals. *Indiana v. Kentucky*, 136 U.S. at 516-18; *Louisiana v. Mississippi*, 202 U.S. at 52-53. Mississippi deeded the land to the predecessor of the Houston Group in 1933.

On the other hand, the trial court found no evidence of Louisiana acting in any respect to assert jurisdiction or authority over Stack Island prior to its intervention in this action. See App. at 38a-41a.

Apart from its error in the treatment of the trial court's fact-findings with respect to the location of the thalweg and acquiescence, the court below clearly erred in concluding that its placement of the thalweg in 1881 established the boundary between Louisiana and Mississippi.

## II. THE COURT BELOW EXCEEDED THE PROPER SCOPE OF REVIEW UNDER RULE 52(a)

This case was tried to the court without a jury. The court was required to determine the plausibility of conflicting testimony of experts presented by Mississippi and Louisiana in interpreting century-old documentary evidence. On the basis of this determination, the trial court

made findings of fact as required by Rule 52(a) of the Federal Rules of Civil Procedure.

The trial court found that in 1881 the thalweg of the Mississippi River lay west of Stack Island.<sup>11</sup> It made findings with respect to dominion, control, and sovereignty over Stack Island by Mississippi and the failure of Louisiana to establish any definitive claim, right or jurisdiction over the land.<sup>12</sup> These findings should have been regarded as coming to the Fifth Circuit "well armed with the buckler and shield" of Rule 52(a). *Horton v. U.S. Steel Corp.*, 286 F.2d 710, 713 (5th Cir. 1961). The rule provides that findings of fact "shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a).

The Fifth Circuit said that it was "resolving this factual dispute. . . against the backdrop of the clearly erroneous standard," 937 F.2d at 250-51; App. at 7a, but it misconceived what that standard means. It says, two paragraphs later:

Although we acknowledge that the district court's findings are entitled to deference, after our review of the evidence, we are "left with the clear impression that an error has been made."

<sup>11</sup> No specific findings were made with respect to the existence of Stack Island prior to 1881, although that finding is subsumed in the determination of its location at that date.

<sup>12</sup> The trial court stated that it made its finding that Stack Island is located in Mississippi under the Doctrine of Acquiescence if it should be found to have erred in its determination that Stack Island is located in Mississippi under the Rule of the Thalweg. App. at 37a.



*Stauffer Chemical Co. v. Brunson*, 380 F.2d 174, 181 (5th Cir. 1967).

937 F.2d at 251; App. at 8a.

A decision that relies on a 1967 precedent to measure the reach of Rule 52(a) in 1991 is inherently suspect. A great deal has happened in the last quarter-century to clarify the scope of appellate review in nonjury cases. The rule was amended in 1985 to resolve a matter that long has been in controversy and to specify that the "clearly erroneous" test applies to all findings of fact, "whether based on oral or documentary evidence."

Even more important was this Court's decision in that same year in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). Justice White's opinion for the Court in that case clarified much that had previously been in doubt and narrowed or eliminated the freedom that some courts of appeals had thought they had to redetermine factual issues. The Court restates the general test as whether the reviewing court "is left with a definite and firm conviction that a mistake has been committed," 470 U.S. at 573, but it gives that test a new meaning:

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible

views of the evidence the fact-finder's choice between them cannot be clearly erroneous.

470 U.S. at 573-74 [citations omitted].

The evidence on the critical issue about the thalweg involved a combination of documentary evidence and expert interpretation of that evidence. The Fifth Circuit simply disagreed with the trial court's findings on that issue and concluded that Mississippi's expert witness had misinterpreted the documentary evidence before him. In short, the Fifth Circuit, contrary to the trial court, accepted the interpretation of the Louisiana experts rather than that of the Mississippi expert.<sup>13</sup> This is not permissible under the *Anderson* rule. If, as repeatedly stated by the Fifth Circuit, the evidence is inconclusive, then there are two permissible views of it, the district court's reading of the evidence cannot be thought

---

<sup>13</sup> The court below concluded that it was "illogical" for vessels to employ a route that was longer and marked by treacherous "shoals" and on this basis held that the thalweg was incorrectly found by the trial court. 937 F.2d at 251; App. at 9a. It brushed aside evidence to the contrary on which the trial court had relied. A surveyor's notation that there was a "good deep channel" to the west of Stack Island was dismissed as a "vague notation" and "less than determinative." *Id.* The placement of United States navigation lights on the banks of the river as reflected on a shoreline survey was thought to be "inconclusive." *Id.* at 252; App. at 9a. A reference in the shoreline survey to "shoals" at the foot of the east channel was thought to be "refuted" by hydrographic data obtained three months later and shown on another survey map, and these "factual disputes" were thought to demonstrate the "inconclusiveness" of the shoreline survey. *Id.* at 252, n. 4; App. at 9a.



implausible and the findings cannot be set aside as "clearly erroneous."

This Court spoke with such clarity in *Anderson* that the decision below might be regarded as an aberration, not worthy of review here. There would be much to be said for that view if this were a purely private dispute. But when the boundary between two states is at issue,<sup>14</sup> the rules as laid down by this Court must be followed with precision and an appellate court cannot be permitted to set aside the considered decision of a district court because the appellate court would have weighed the evidence differently and reached a different result.

### III. THERE IS A SERIOUS QUESTION, WHICH ONLY THIS COURT CAN RESOLVE, ABOUT THE BINDING EFFECT OF THE JUDGMENT BELOW

If the decision of the Fifth Circuit is allowed to stand without review by this Court, its binding effect on any or all of the parties to the suit will be wholly uncertain. Stack Island will be left neither in the State of Mississippi nor the State of Louisiana but in the state of legal limbo.

One view is that only this Court can decide where the boundary lies. This was the view of Louisiana when it unsuccessfully sought leave to invoke the original jurisdiction of this Court to resolve this dispute. In paragraph

<sup>14</sup> Louisiana characterized the boundary issue as one of "major and substantial significance." (La. Comp. at 11; App. at 81a)

XX of its proposed complaint, it alleged that "[t]he decision of the Supreme Court of the United States herein will be conclusively binding on all private parties and it alone has the power to fix and determine the boundary lines herein described." App. at 82a. In its Brief in Support of its Motion, at page 16, it said: "The Supreme Court of the United States is the only forum to settle this dispute, fix the boundary line between the states, and determine finally the rights of the parties." App. at 84a. And the Court itself has said that "this Court, not a Court of Appeals, is the place where an interstate boundary dispute usually is to be resolved." *Georgia v. South Carolina*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2903, 2913 (1990).

Another view would rely on "this Court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States." *Durfee v. Duke*, 375 U.S. 106, 115 (1963). On this view, if the Mississippi District Court had found that Stack Island is in Mississippi and if that decision had been affirmed, it would bind all the parties to the suit, but, since the judgment below is that the land is in Louisiana and the case came from a Mississippi court, it cannot be given any effect. This appears to have been the view of Justice White and of the two other Justices who joined his dissent from the denial of Louisiana's motion for leave to file a bill of complaint. "Perhaps denial of leave to file rests on the possibility that the private action will go forward with Louisiana as a party and that a judgment unfavorable to, but binding on, Louisiana will be entered." *Louisiana v. Mississippi*, 488 U.S. 990, 991 (1988) (White, J., dissenting). This also is the

view Louisiana took at page 9 of its Brief in Support of Petition for Rehearing of the denial of leave to file.

[A] judgment by the District Court that Island No. 94 is in Louisiana would not bind Mississippi, nor necessarily the numerous private parties involved. Such a judgment would not necessarily deter dual assessment and taxation by the taxing bodies of the two states, nor dissuade both Mississippi and Louisiana claimants from asserting acts of ownership and possession.

App. at 96a.

There is still another possibility. This is that the judgment of the Fifth Circuit that the land is in Louisiana is, unless reversed here, final and binding on all the parties. This is not a case like *Durfee v. Duke*, 375 U.S. 106, 115-16 (1963), where the states involved were not bound because they were not parties to the purely private litigation. Nor is it like *Georgia v. South Carolina*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2903, 2913 (1990), where some local officials had been served with process, but "South Carolina itself was never served and made no appearance." Although the present suit began as an action between private parties, both Louisiana and Mississippi appeared in the district court, both sought a declaration of "the proper boundary line between the State of Louisiana and the State of Mississippi," and both took an active part in the litigation in the trial court and on appeal.

This Court has said that *Durfee v. Duke* established "the rule of jurisdictional finality" and "the *Durfee* Court explicitly refused to recognize an exception to the rule of jurisdictional finality for cases involving real property over which the State claims exclusive jurisdiction."

*Underwriters National Assurance Co. v. North Carolina Life & Acc. & Health Ins. Guar. Assn.*, 455 U.S. 691, 705, n. 11 (1982). On this third view, the location of Stack Island has been fully litigated and judicially determined in a proceeding in which both of the States and all of the private parties concerned took part, and the rule of jurisdictional finality means that this determination is binding on all of them.

It is not necessary now to say which of these views is correct. Suffice it to say that there is support in reason and precedent for all three of them. Unless this Court settles the matter, the certain consequence will be, as Louisiana predicted in its brief quoted above, that both States will continue to assert jurisdiction over the land in question and that further litigation will take place. To leave this in limbo after many years of litigation is no way to treat even the private parties, much less the sovereign States.

This Court should grant certiorari not only to resolve the important substantive issues the case presents but to settle, as only the Court can, the effect of the judgment on all the states and private interests involved.<sup>15</sup>

---

<sup>15</sup> If the Court should conclude that the first view expressed in this section of the Petition is correct and that state boundaries can only be settled by the exercise of the original and exclusive jurisdiction granted by 28 U.S.C. § 1251(a), we suggest that it can treat this Petition as a motion to invoke that original jurisdiction and that, rather than appointing a Master, the Court may consider the findings of the trial court, as reviewed by the court below, as equivalent to those of a Master and as a sufficient basis on which to make a decision in the exercise of that original jurisdiction.

**CONCLUSION**

This Court should issue its writ of certiorari to review the decision of the court below.

Respectfully submitted,

CHARLES ALAN WRIGHT  
727 East 26th Street  
Austin, Texas 78705

MIKE MOORE, Attorney General  
ROBERT E. SANDERS, Assistant  
Attorney General  
State of Mississippi  
P. O. Box 220  
Jackson, Mississippi 39205

ROBERT R. BAILESS  
WHEELLESS, BEANLAND, SHAPPLEY &  
BAILESS  
P. O. Box 991  
Vicksburg, Mississippi 39181

JAMES W. MCCARTNEY  
*Counsel of Record*  
VINSON & ELKINS L.L.P.  
3201 First City Tower  
1001 Fannin Street  
Houston, Texas 77002-6760  
(713) 758-2324  
FAX (713) 758-2346

*Counsel for Petitioners*

January 16, 1992